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IN THE

Supreme Court of the United States

..... TERM, 1940.

NO. 371

ESTATE OF ANNA M. KELLER, PIUS P. KELLER and MARCELLA V. KELLER, Executors,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Estate of Anna M. Keller, Pius P. Keller and Marcella V. Keller, Executors, represents:

Summary and Statement of the Matter Involved.

This proceeding was initiated when petitioners filed a petition with the United States Board of Tax Appeals for a redetermination of a deficiency which the Commissioner of Internal Revenue had determined to be due from petitioners as additional estate tax.

The question presented by the record is one of exemption from estate taxation, viz: Upon the death

of a decedent who in her lifetime executed on the same day but as separate contracts a single premium life insurance contract and a single premium annuity contract, is the amount (being less than $40,000) received by the life insurance beneficiary "insurance" as that term is used in Section 302 (g) of the Revenue Act as amended, and accordingly exempt from estate taxation and not includible in decedent's gross estate?

The Board of Tax Appeals reversed the Commissioner and held that there was no deficiency in estate tax. The Board's Findings of Fact will be found in the Record, pp. 13-24 and the Opinion, pp. 24-46.

The United States Circuit Court of Appeals for the Third Circuit reversed the Board of Tax Appeals. The Circuit Court's opinion will be found in the Record, pp. 94-101.

The facts as found by the Board of Tax Appeals are substantially as follows (R. 14-24):

Petitioners are the executors of the estate of Anna M. Keller, deceased. The decedent died March 28, 1936. (R. 14.)

On December 31, 1934, the decedent, at the age of 75, executed a contract with the Equitable Life Assurance Society of the United States, sometimes hereinafter referred to as the insurance company. The contract is designated "Life Annuity. Single Premium. Non-Participating" and provides for the payment of a single premium of $3,258.20 to the insurance company in consideration for semi-annual annuity income payments of $195.42 by the insurance company to the annuitant during her lifetime. The contract was on the regular standard form used by the insurance company for writing annuity contracts, and among other things provided

that "this agreement, and the application therefor, a copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties." (R. 14-15.)

On the same day that the annuity contract was executed, the decedent also executed a policy or contract with the insurance company for the face amount of $20,000 which was designated as "Single Premium Life Policy. Insurance Payable at Death. Single Premium. Annual Dividends." The policy was on the regular standard form used by the insurance company for writing life insurance policies. This insurance was granted in consideration of the payment in advance to the Society of a single premium of Seventeen thousand nine hundred forty-one and 80/100 Dollars. (R. 15-16.)

This policy also contained provisions relating to assignments, change of beneficiary, policy years, age and self-destruction. There was a provision captioned "The Contract" which provided as follows (R. 16-17): "This policy, and the application therefor, a copy of which is endorsed hereon or securely attached hereto, constitute the entire contract between the parties. * * *." The policy also contained a "Table of Loan and Cash Surrender Values for each $1,000 of Face Amount."

The company accepted in lieu of a medical examination the issuance of the life annuity contract, through which the company reduced but did not entirely eliminate its risk against loss due to premature death. (R. 18.) The insurance company would not have issued the insurance policy to the insured at her attained age of 75 years without issuing a life annuity contract in conjunction with the insurance policy but in computing the single premium paid for the life insurance contract, no adjustment was made for the amount received as a premium for the annuity contract. The considera-

tion charged for the annuity contract would have been the same even if no life insurance had been purchased at the time and the decedent could have obtained the annuity contract without the insurance policy, in which case the annuity would have been identically the same as in the annuity contract which was issued to the decedent. The requirement of the annuity contract as a condition precedent to the issuance of the insurance policy was due to the amount of risk involved, namely, the difference between the consideration and the death benefit. (R. 18-19.)

The total consideration paid by the decedent to the insurance company for the two contracts amounted to 106 percent of the face amount of the insurance policy or $21,000, which was $1,200 in excess of the face amount of the insurance policy. The name given to the $1,200 by the insurance company is "loading" and is for the purpose of paying commissions to the general agent and the special agent and for premium taxes. The actual expense exclusive of any profit and general overhead expense of the insurance company in issuing the two contracts in question was $1,475.97.

The above total charge of 106 percent on this type of contracts was later found to be unprofitable, at which time the charge was increased by the insurance company to 110 percent, and still later the issuance of an insurance policy like the one in question was made conditional upon a medical examination. (R. 19-20.)

The insurance company at all times treated the two contracts entered into with the decedent on December 31, 1934, as two separate transactions rather than as one transaction. (R. 20.) The company in its reports to the State Commissioner of Insurance listed the contracts separately—one under the life insurance group and the other under the annuity group.

The principal cause of decedent's death was cerebral hemorrhage of one-half day duration. Up until the time of her last illness the decedent had enjoyed excellent health, had been remarkably free from any illnesses or disabilities, had been especially active for one of her years, enjoyed life and never expressed any expectancy of dying, nor mentioned death. Her mother and her grandmother were both in their nineties when they died. (R. 24.)

The Commissioner included the proceeds of the life insurance in decedent's gross estate, claiming the entire transaction represented a transfer made to take effect at or after death, in accordance with the provisions of Section 803, Revenue Act of 1932, which amended Section 302 (c), Revenue Act of 1926, and imposed a deficiency in estate tax of $3,243.64. (R. 8-10.) The Board of Tax Appeals reversed this determination, holding that the proceeds of the life insurance is not includable in the decedent's gross estate as a transfer made in contemplation of death, or otherwise, and that the amount so paid represents "insurance under policies taken out by the decedent upon her own life" as that term is used in Section 302 (g) of the Revenue Act of 1926, as amended. The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 28, 1940. No petition for rehearing was filed. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 [28 USCA §347 (a)].

Question Presented.

Whether the amount paid by an insurance company to the beneficiary named in a life insurance policy taken out by the decedent on her own life (which was the standard form customarily used by the company) and which amount would unquestionably be considered "insurance" as that term is used in Section 302 (g) of the Revenue Act of 1926 as amended and therefore be excludible from decedent's gross estate, is not to be considered "insurance" and therefore is not excludible from the estate merely because the decedent, aged 75 when she took out said life insurance policy, also at the same time took out a separate annuity policy with the same company (which annuity policy was the standard form customarily used by the company) and without which annuity policy the company would not have issued said life insurance policy.

Statutes and Regulations Involved.

The pertinent statutes and regulations will be found in the Appendix, *infra,* pp. 9-10.

Reasons Relied on for Allowance of the Writ.

I. The decision of the Court below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. LeGierse,* 110 F. (2d) 734, decided March 24, 1940, upon practically the identical facts as the case at bar and in which case the Court upheld as insurance and within the exemption of Section 302 (g) of the Revenue Act, a single premium life insurance policy issued on the standard form taken out by decedent, aged 80, although on the same date decedent purchased from the same company a single premium an-

nuity without which latter contract the company would admittedly not have issued the insurance policy.

II. In the case of *Commissioner v. LeGierse (supra)* the Commissioner has petitioned your Honorable Court at No. 237 October Term, 1940, for a Writ of Certiorari. That case which is in conflict with the case at bar and which is on similar facts and involves the same legal question as the case at bar, affirms the opinion of the Board of Tax Appeals, whereas the Circuit Court of Appeals in the case at bar reverses the opinion of the Board of Tax Appeals.

III. The decisions of the Circuit Court of Appeals of the Third Circuit in this case, of the Second Circuit in *Commissioner v. LeGierse (supra)* and of the Eighth Circuit in the case of *Commissioner v. Tyler,* 111 F. (2d) 422, decided April 29, 1940, all being decisions based on substantially the same facts, involve an identical and important question of federal law, upon which this Court is the ultimate arbiter, to-wit, Section 302 (g) of the Revenue Act of 1926, as amended, and which question has not been, but should be, settled by this Court.

IV. Your petitioners are advised, believe and therefore aver (and the Commissioner so states in his petition for Writ of Certiorari in *Commissioner v. LeGierse (supra)*) that the question here raised presents an important question in the administration of the federal estate tax laws and there are between 300 and 400 like cases pending in the Bureau of Internal Revenue involving substantial amounts of revenue. In other instances where the same question has been raised, the Treasury Department through the Bureau of Internal Revenue has held the matter in abeyance awaiting the ultimate decision in the instant case. The question is thus of sufficient importance to warrant final determination by this Court.

Conclusion.

In view of the conflict in decisons of various Circuit Courts of Appeal, the general importance of the question presented, and the petition for certiorari filed by the Commissioner in *Commissioner v. LeGierse (supra)* which conflicts with the Circuit Court's decision in the case at bar, it is respectfully submitted that the petition for certiorari be granted.

And your petitioners will ever pray, etc.

FERDINAND T. WEIL,

J. SMITH CHRISTY,

Attorneys for Estate of Anna M. Keller, Pius P. Keller and Marcella V. Keller, Executors, Petitioners.

APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Sections 401 and 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible wherever situated, except real property situated outside the United States—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possesion or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been

made in contemplation of death within the meaning of this title.

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * * * *

(U. S. C, A., Title 26, Sec. 411.)

Article 25 of Regulation 80 (1937 Ed.):

Art. 25. TAXABLE INSURANCE—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. * * *